5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 8000421/2024

10 **Preliminary Hearing held remotely in Edinburgh on 21 August 2024**

Employment Judge A Kemp

15 **Ms Nicole Henderson** **Claimant**
Represented by
Mr M Meikle
Representative

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Ivanmed Ltd **Respondent**
Represented by:
Mr D Brown
25 **Legal and Business**
Support

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's claims of breach of contract and of unauthorised deduction from wages under section 13 of the Employment Rights Act 1996 are within the jurisdiction of the Employment Tribunal, both succeed and the claimant
35 **is awarded the sum of FOUR HUNDRED AND ONE POUNDS TWENTY SIX PENCE (£401.26) payable by the respondent.**

REASONS

Introduction

1. This was a Final Hearing which included issues of jurisdiction into claims of breach of contract and for holiday pay. The claimant was represented by Mr Meikle, who had some experience of Tribunal claims, and the respondent by its employee Mr Brown, who did not.

2. A Claim was originally presented against James Anderson, the director of the respondent on 5 February 2024. That was on time but had an error as the Early Conciliation Certificate was in the name of the limited company. The error was pointed out and corrected, but by that time the claim was out of time unless the issue of reasonable practicability and commencing the claim within a reasonable time thereafter was satisfied.

The claims

3. The claimant through Mr Meikle confirmed that she made claims of breach of contract in relation to notice, of one week, and unlawful deduction from wages in relation to holiday pay of one day. A claim for holiday pay could also be made under the Working Time Regulations 1998 but the provisions as to jurisdiction are in effectively the same terms as those set out below.

The issues

4. I explained that I had identified the following issues:

   (i) whether either claim was within the jurisdiction of the Tribunal

   (ii) if so, whether the respondent was entitled to terminate the claimant's contract summarily

   (iii) whether the claimant had any entitlement to holiday pay, and

   (iv) if either claim succeeds to what remedy is the claimant entitled.

5. The parties were content with that. I explained before evidence was heard how the hearing would be conducted, about the giving of evidence for all of the issues, cross-examination covering any point not considered correct

made by the witness, and any matter the other party wished to give evidence about or found on that the witness may know about, and re-examination, and that I could ask questions to elicit facts under Rule 41, but required to do so under the overriding objective in Rule 2. I also explained about the giving of submissions once evidence was concluded.

The evidence

6. The claimant gave evidence herself, as did Mr Brown. The parties had produced a short Bundle of Documents.

The facts

7. I found the following facts, material to the issues before me, to have been established:

8. The claimant is Ms Nicole Henderson.

9. The respondent is Ivanmed Ltd. Its majority shareholder and Managing Director is Mr James Anderson. It has 12 employees.

10. The claimant commenced employment with the respondent on 22 August 2023 as a Digital Marketer. She had a contract of employment in writing [which was not before the Tribunal]. It provided for a three month probationary period. The claimant worked 37 hours per week Monday to Friday.

11. The claimant was initially working in the Digital Marketing role. At some point thereafter the role was agreed to be changed to one more on a creative side, including in relation to social media. No amended contract was provided, nor was any Job Description provided at any stage.

12. The claimant had one meeting with Mr Anderson on a date not given in evidence when he indicated that the claimant's performance was acceptable.

13. The claimant was called to a meeting with Mr Anderson on 16 November 2023 which he said was to review her probation. He asked her about what she had been doing. When she did not have detailed figures to hand she was asked to guess them. On hearing the answers he said something to

the effect that the trial was not working out and that her employment was terminated immediately.

14. By email of 30 November 2023 the respondent wrote to the claimant. The letter stated that "We thank you for attending the trial period with our company. It was unfortunate it did not work out. This email is to confirm that your[r] trial period ended on Thursday 16th November however we paid you until the Friday 17th November as a goodwill gesture….". The claimant had been paid her salary for November 2023 on or around 28 November 2023.

15. The claimant was paid for a total of six days' holiday pay during her employment with the respondent. Her net salary per month was £1.890.

16. Early Conciliation was commenced on 15 December 2023 against the respondent and a certificate issued on 26 January 2024.

17. Mr Dylan Brown joined the respondent as an employee in around February 2024.

18. A Claim Form was presented by the claimant with James Anderson named as respondent on 5 February 2024. Her representative at that time was Mr Steven Lawson, her father-in-law, who is not legally qualified or experienced in Tribunal proceedings.

19. By letter dated 8 February 2024 the Tribunal rejected the Claim under Rule 12(1)(f) as the respondent was not the same as the entity named in the early conciliation certificate. The Claim was given a pre-acceptance number of 4102580/2024.

20. Mr Lawson replied the same day saying that he was surprised as Mr Anderson "owns the business" and asked if he had to send a letter to explain what had happened.

21. On 9 February 2024 the Tribunal wrote to Mr Lawson to state that "the claim must be directed against the employer and not the owner of the employer."

22. On the same date Mr Lawson emailed the Tribunal to state that he "would like to appeal the decision to reject the claim attached, I mistakenly put the

owner of the company's name instead of the company itself, which is Ivanmed".

23. The Tribunal wrote to Mr Lawson on 12 February 2024 to state that the application for reconsideration had been rejected, and state that the respondent's name on the existing ET1 should be "amended to match the name of the prospective respondent on the ACAS Early Conciliation Certificate." Mr Lawson did not tell the claimant about that as he was concerned at her mental health, which had been affected by the dismissal.

24. In late February 2024 the claimant accepted a new role with another company. In about mid March 2024 Mr Lawson told her about the rejection of the Claim. She was aware of the Tribunal correspondence sent to him. She called the Tribunal in Glasgow to ask for advice on how to proceed.

25. On 27 March 2023 the claimant wrote to the Tribunal to "request the opportunity to file a reconsideration."

26. The Tribunal wrote to the claimant on 2 April 2024 to state that it was an independent judicial body and could not advise either party, and referred to submitting a new ET1.

27. A Claim Form was presented by the claimant with Ivanmed Ltd as respondent on 7 April 2024, with an expanded narrative as to the grounds for doing so. It was accepted by the Tribunal with the above reference number.

Submissions

28. Mr Meikle in brief summary accepted that an error had been made with the identity of the respondent on the Claim Form by Mr Lawson, but it was a genuine one. Detail had been withheld from the claimant at the time. There was no evidence of any gross misconduct. It was not in the letter of 30 November 2023. If there was a performance issue notice was payable, as was one day's holiday pay.

29. Mr Brown again in brief summary said that the respondent had invested in the claimant, had changed her job role rather than sacked her earlier, that

she had been given guidance at meetings, and had been distracting others. He noted changes between the two Claim Forms.

The law

30. A claim for notice pay is one for breach of contract. The Tribunal has jurisdiction to consider a claim for breach of contract under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 under Regulation 4. By Regulations 7 and 8B essentially the same test arises as is in section 111 of the Employment Rights Act 1996 in relation to unfair dismissal claims, and the case law is generally found in relation to those claims of unfair dismissal. It is applied to all the relevant statutory provisions – ***GMB v Hamm EAT 0246/00***. It is subject firstly to early conciliation under section 207B of the said Act, and secondly that where the Tribunal is satisfied that it was not reasonably practicable to present the complaint within the period of three months the Tribunal may consider it if it is presented within such further period as the Tribunal considers reasonable.

31. There is a right not to suffer unauthorised deductions from wages under section 13 of the Employment Rights Act 1996. The matter may be raised in an Employment Tribunal under section 23 of that Act. It provides that a claim must be commenced within a period of three months from the date on which a deduction from wages was made, with equivalent provisions as to early conciliation extending the time limit. Where there is a termination of employment, any damages for breach of contract (if due) become payable at that date.

32. The EAT considered timebar in relation to claims for notice and holiday pay in ***Wharton v Sheehan [2024] EAT 127*** where there was a payment made after termination for accrued holiday pay, said to be insufficient, and that date of when payment had been partly made was taken as the date for the purposes of timebar.

33. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time where that is the case: ***Porter v Bandridge Ltd [1978] IRLR 271.***

34. The question of what is reasonably practicable is explained in a number of authorities. In ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119,*** a decision of the Court of Appeal, the court suggested that it is appropriate: "to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months'?" That, it explained, is a question of fact for the Tribunal taking account of all the circumstances. It gave the following guidance:

> "Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It will no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Industrial Tribunal to investigate whether at the time when he was dismissed, and if not then when thereafter, he knew that he had the right to complain that he had been unfairly dismissed; in some cases the Tribunal may have to consider whether there has been any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for it to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisors' knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him. In any event it will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there has been any substantial fault on the part of the employee or his advisor which has led to the failure to comply with the statutory time limit. Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal taking all the circumstances of the given case into account."

35. Ignorance, usually of the fact of a time limit has been an issue addressed in a number of cases. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52,*** the test which Lord Denning had earlier put forward in another case, Dedman, was re-iterated as -

> "It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

36. In ***Marks and Spencer plc v Williams-Ryan [2005] IRLR 562*** the Court of Appeal stated that "The first principle is that section 111(2) should be given a liberal interpretation in favour of the employee." It set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the claimant knew with regard to the time-limit (ii) what knowledge the claimant should reasonably have had and (iii) whether she was legally represented.

37. In ***Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490***, the Court of Appeal re-stated that the test of reasonable practicability should be given a liberal interpretation in favour of the employee. The claimant in that case did not have professional advice, which was held to be a factor in his favour.

38. The nature of the test was considered more recently in ***Cygnet Behavioural Health Ltd v Britton [2022] EAT 18,*** in which it was stated that

> "the employment judge directed himself that section 111(2) should be given a liberal construction in favour of the employee, citing ***Dedman v. British Building & Engineering Appliances Ltd [1974] ICR 53, CA***. In my judgment, I note that this is not reflective of the way that section 111(2) has been interpreted and applied by the Court of Appeal in more recent cases. The test is a strict one and, perhaps in contrast to the 'just and equitable' extension in

other statutory contexts, there is no valid basis for approaching the case on the basis that the ET should attempt to give the 'not reasonably practicable' test a liberal construction in favour of the claimant."

5 39. It is, with great respect to the EAT, difficult to understand that last sentence except in the context of a distinction with the test in discrimination law. The reference to a liberal interpretation in favour of the employee had itself been made in ***Williams-Ryan,*** which the EAT in ***Britton*** cited, and although ***Brophy*** was not mentioned it had re-stated that principle. 10 ***Williams-Ryan*** and ***Brophy*** are both Court of Appeal authority. Each is not binding on a Tribunal in Scotland but is worthy of considerable respect, particularly in relation to a UK-wide statutory provision. I consider that they should be preferred to ***Britton***, and followed, in this respect.

40. Where a claimant was under a mistake as to the detail of the time limit, 15 guidance on the issues that arise was given in ***Dedman*** as follows:

"What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to 20 disregard it, relying on the maxim 'ignorance of the law is no excuse'. The word 'practicable' is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance".

41. It appears to me firstly that the statutory words must be applied, and 25 secondly that in doing so whilst a liberal interpretation of those words in favour of the employee is permissible, that is against the test of reasonable practicability, and not whether what the claimant did was reasonable. All of the circumstances are considered when making that assessment.

42. In relation to the claim of breach of contract the respondent summarily 30 terminated the contract, and the onus falls on it to prove that it was entitled to do so. That depends on whether the employee was in material breach of contract. The basic test for whether a breach is material, entitling the innocent party to accept that breach and terminate the contract by

rescission, is a breach which goes to the root of the contract. It is a question of fact judged by reference to all the circumstances - ***Wade v Waldon 1909 SC 571*** and ***Alexander Graham & Co v United Turkey Red Co Ltd 1922 SC 533***. A party in material breach of contract may be said to have repudiated the contract ***Lloyds Bank plc v Bamberger 1993 SC 570.***

43. The entitlement to notice if there is no such breach by the employee entitling rescission is to a week's pay under section 86 of the Employment Rights Act 1996 for the circumstances of the claimant.

44. The entitlement to holiday pay arises from the Working Time Regulations 1998. Where it is in the context of termination part way through the holiday year it is calculated on a pro-rata basis, as provided for in Regulations 14 and 16.

Discussion

45. I was satisfied that the claimant was a credible and reliable witness. Mr Brown was not employed at the time of the material events. His evidence was purely hearsay. Mr Anderson was not called to give evidence on the explanation that he was abroad, and Mr Taylor Cunningham who had worked with the claimant was also not called. They were both said to have had discussions with the claimant, but they had not been put to the claimant in evidence although the need to raise any matter that Mr Brown would give evidence about had been explained at the start of the hearing, nor had it been put that she had distracted others.

46. The first issue is that of jurisdiction in relation to timebar. This is not a simple matter. It is agreed that the contract terminated on 16 November 2023. Early Conciliation was commenced against the correct respondent timeously. A certificate naming the respondent above was issued on 26 January 2024. The payment date for the salary due for November 2023 was given in the claimant's evidence as around 28 November 2023. When I asked Mr Brown about that, he did not have the detail before him, such that that evidence was not disputed. I considered that the claimant's evidence on the date of that payment should be accepted, although it was somewhat vague, and it appeared to me that from that date, under the

Early Conciliation provisions and explanation in authority particularly ***Wharton***, that the time to present a Claim Form timeously was up to 10 April 2024.

47. A Claim Form was issued on 5 February 2024. It would have been timeous had it been accepted, but it was not. The name of the respondent on the Claim Form was that of Mr Anderson, whereas the Certificate named the limited company above. Because of that the Claim Form was rejected. There was quick notification of that, but Mr Lawson did not act on it as he might, as he did not seek to amend the claim to direct it to the respondent company. He did not do so after the application for reconsideration itself was rejected.

48. The claimant became aware of the position in about mid March 2024. She contacted the Tribunal, and wrote to the Tribunal on 27 March 2024. Presenting a new claim for against the respondent was still well within time, yet she asked about reconsideration. The Tribunal replied on 2 April 2024 referring to a new Claim Form and that new claim then presented on 7 April 2024.

49. The first question is whether that is in time. On the basis that the due date for payment was 28 November 2023 it is. That is sufficient to resolve that issue.

50. I did however also consider what the position was on the alternative basis if the due date for payment had been 26 November 2023 or earlier, as the Claim would then not be in time. I did so having regard to all the evidence. I was satisfied that the claimant had established that it was not reasonably practicable to have presented the claim timeously.

51. The test as to reasonable practicability does require to be given a liberal interpretation, and the absence of legal advice is a factor to take into account. Others are that the claimant did seek advice from the Tribunal on 27 March 2023, and the response was on 2 April 2023. She presented the Claim Form, in terms which were more expanded than those originally set out, five days later.

52. Whilst the case is a narrow one, even if it is not in time it appeared to me that it had not been reasonably practicable to have presented it earlier given all the circumstances, and that it was presented within a reasonable period of time.

53. As a result, the Tribunal does have jurisdiction for the claims made and the first issue is answered in the affirmative.

54. The second issue is that of breach of contract. On this I had no hesitation in preferring the claimant's evidence that she had not been told of performance issues, had not had issues raised, and that nothing as to gross misconduct or similar was said to her at the meeting on 16 November 2023. Mr Anderson who conducted that meeting did not give evidence. His would have been the best evidence for the respondent. Neither did anyone else present at the time of the claimant's employment who might have given evidence about the alleged actions which were said to amount to a breach of contract justifying summary termination.

55. Mr Brown did his best, but his evidence was at best hearsay, did not dispute what the claimant had said about that meeting, and had the other difficulty that the 30 November 2023 email does not refer to gross misconduct at all. Its wording is more consistent with the suggestion that the probationary period was not thought to have been passed successfully. If there had been an allegation of gross misconduct (although that is not the contractual test, which is one of material breach) it is at the least inconsistent to pay one extra day of salary, as the letter refers to.

56. The basis of gross misconduct was also not clear from Mr Brown's evidence. The highest it came to was some form of distraction said to have been caused to others, but that had not been put to the claimant in cross-examination. It was difficult to see how distraction of others could in any event amount to a fundamental breach entitling the respondent to terminate the contract summarily unless it was both persistent and serious, in which case one would have thought that someone from the respondent would have been able to give evidence about that, which did not occur.

57. The contractual test for repudiation was not met, in my view, from the evidence I heard which was at best very general in its terms. Mr Brown also referred to the sums paid in total to the claimant, but that is irrelevant to the issue of rescission. There requires to be a material breach by the claimant.

58. Mr Brown's evidence was both insufficient of itself, and had not been properly put to the claimant in any event. I concluded that the respondent had not discharged the onus on it to prove that the claimant had been in material breach entitling rescission. The respondent is therefore in breach of contract in not paying the notice pay due.

59. The third issue is as to holiday pay. The entitlement under the 1998 Regulations is 28 days. The claimant had not put the contract before me, which provided it was said to 29 days. The statutory entitlement is to 28 days and that is the figure I proceed from. It was agreed that 6 days had been paid. As set out below, that is less than the accrued entitlement.

60. The final issue is remedy. The claimant's agreed net pay per month was £1,890. It was not clear whether the claimant was in the pension scheme, and in the absence of evidence of that I did not take that possibility into account. The claimant's net pay is the equivalent of £87.23 per working day. She was entitled to notice of a week, or five day's pay, but had been paid for 17 November 2023, and that leaves four days. The sum due is accordingly £348.92.

61. For holidays the calculation is a pro-rata one under Regulation 14, being of the total days worked (86) as a proportion of the year (365) against the full year entitlement of 28 days. For the period worked the accrued entitlement is to 6.6 days. 6 were paid, leaving a balance of 0.6. which is £52.34.

62. The total sum due is £401.26. That is the award made. For the avoidance of doubt no statutory deductions are due from that award, and if any sums are payable for income tax or national insurance contributions or otherwise they are payable by the respondent in addition.

Employment Judge:	**A Kemp**
Date of Judgment:	**22 August 2024**
Entered in register:	**22 August 2024**
and copied to parties	